



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO. E047 OF 2021

VINCENT MARITA OMAO.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY.....2ND RESPONDENT

COUNTY SECRETARY NYAMIRA COUNTY.....3RD RESPONDENT

CHAIRPERSON NYAMIRA COUNTY PUBLIC SERVICE BOARD..4TH RESPONDENT

SECRETARY NYAMIRA COUNTY PUBLIC SERVICE BOARD.....5TH RESPONDENT

AND

GODFREY KIRIAGO NYANGAU.....1ST INTERESTED PARTY

ELMELDA KEMUNTO NYABERI.....2ND INTERESTED PARTY

RULING

1. Before court is an application dated 6th January, 2022, brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The Applicant seeks an order of stay of execution of the Judgment of this court delivered on 16th December, 2021. The application is supported by grounds on the face of the motion, together with a supporting affidavit sworn by one **Peter Onchari Kereri**, the 4th Respondent/Applicant herein.
2. Mr. Oange Counsel for the Applicants, submitted that the application herein was filed without inordinate delay. It is his submission that the impugned judgment was rendered on 16th December, 2021 and the application filed on 10th January, 2022, about 25 days after the judgment appealed against.
3. It is submitted for the Applicants/Respondents, that unless the order sought is granted, the Applicants stand to suffer irreparable loss as the appointment of the Interested parties stands revoked.
4. It is further submitted for the Applicants, that the Interested Parties hold critical positions within the structure of the County Government of Nyamira, and their exit has fundamentally stalled operations of the County. It is Mr. Oange's argument that to date some employees of the County have not been paid salaries for lack of an officer to oversee the payroll, and which occurrence has paralyzed the operations of the County Government.
5. The Applicants further argue that the Interested Parties had begun a payroll clean up exercise which has unearthed serious cases of fraud such as payment of ghost workers and their exit will lead to loss of resources.
6. It is the Applicant's case that the County Government of Nyamira stands to suffer unless the order of stay is granted.
7. The Applicants further submit that the nature of this matter does not call for security as there is no monetary award given in the judgment.

8. The Petitioner opposed the application vide a replying affidavit sworn on 21st January, 2022 by **Vincent Omao Mariita**, the petitioner herein.

9. **Mr. Kimaiyo** submitting for the Petitioner stated that the County Government of Nyamira has both a substantive Director of Human Resources and a Payroll Manager, who are permanently employed in the positions that the Interested Parties were seconded to, and thus no vacuum will be occasioned by the exit of the Interested Parties.

10. It is submitted for the Petitioner that the secondment of the interested parties has already been declared illegal and hence no clean up can be undertaken by persons who are in office illegally.

Determination

11. I have carefully appraised the application, the affidavits sworn by both parties and the Counsels' oral submissions. The issue for determination is whether the application meets the threshold for grant of an order of stay.

12. The legal principles that guide the court in determining an application for stay of execution of Judgment pending appeal, are as set out under Order 42 Rule 6 of the Civil Procedure Rules. In the case of **Kenya Power & Lighting Co. Ltd V. Esther Wokabi (2014) eKLR** it was held that an applicant must satisfy the conditions under Order 42 Rule 6 to deserve orders of stay.

13. Order 42 Rule 6 (2) of the Civil Procedure Rules states: -

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” In the case of **Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991** the Court emphasized that:

“For the Court to grant stay of execution there must be:

(a) Sufficient cause.

(b) Substantial loss.

(c) No unreasonable delay and security offered for due performance of the decree.”

14. The Court of Appeal in **Vishram Ravji Halai V. Thornton & Turpin Civil Application No. 15 of 1990 (1990) KLR 365** held that the High Court's (Read ELRC) power to grant a stay pending appeal, is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

15. Similarly, in **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 Madan, Miller and Porter JJA** gave the following guidelines:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

16. The Judgment subject of this ruling was rendered on 16th December, 2021, while the instant application was filed on 21st January, 2022, 25 days later. I find that the application for stay was filed without unreasonable delay.

17. Considering the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, the binding and persuasive judicial precedents, the evidence in support of the application, the Applicants' natural and undoubted right to seek the intervention of the Court of Appeal, and the unlikely undesirable results from a grant of the order sought, the application dated 10th January, 2022, is allowed, staying the execution of the Judgment of this court delivered on 16th December, 2021, pending the hearing and determination of the appeal.

18. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF MARCH, 2022

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Omas the Petitioner present in person.

Mr. Oange present for the Respondents

Christine Omollo – C/A